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**USF Reddaway, Inc. and Teamsters Local 962, affiliated with the International Brotherhood of Teamsters, Petitioner. Case 36–RC–6340**

January 31, 2007

**DECISION, DIRECTION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held April 18, 2006, and the administrative law judge's supplemental report recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 9 votes for and 8 against the Petitioner, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the judge's findings and recommendations only to the extent consistent with this Decision.<sup>2</sup>

At issue are the Petitioner's challenges to the ballots of Robert A. Burk, Matthew A. Heading and William Melzer. We agree with the judge's recommendation to sustain the challenges to the ballots of Burk and Heading on the basis that they are supervisors.<sup>3</sup> However, we reverse the judge's recommendation to sustain the Petitioner's challenge to Melzer's ballot on the basis that his classification, "parts/mechanic," was not included in the stipulated bargaining unit. Instead we find that the stipulation was ambiguous and, ultimately, that Melzer shares a community of interest with the unit employees. We therefore overrule the challenge to Melzer's ballot and direct that it be opened and counted.

**The Challenge to William Melzer's Ballot**

In their Stipulated Election Agreement, the parties agreed to the following unit:

<sup>1</sup> The judge granted the Petitioner's and the Employer's joint motion to withdraw their respective objections.

<sup>2</sup> Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Employer was permitted to call the Board's attention to its recent decision in *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).

<sup>3</sup> In agreeing with the judge's recommended finding that Burk and Heading are supervisors, we rely only on his findings that they have effectively recommended hiring. We therefore find it unnecessary to pass on his further findings that Burk and Heading responsibly direct the work of unit employees, that they evaluate employees, and that they grant employees time off.

Chairman Battista relies on the effective recommendations as to hiring, the evaluations of employees and on the grants of time off.

All mechanics, fuelers, truck washers, truck inspectors, trailer mechanics and tire persons employed by the Employer at its Central Point, Oregon facility; excluding all office clerical employees, drivers, guards, and supervisors as defined in the Act and all other employees.

The judge found that Melzer's job title, "parts/mechanic," did not fall unambiguously within the stipulated bargaining unit's inclusions. Relying on *Halsted Communications*,<sup>4</sup> the judge reasoned that the stipulated term included in the unit is "mechanic" and the job title "parts/mechanic" was not specifically included. The judge noted that the stipulated unit description contains a broad exclusion from the unit of "all other employees," and therefore recommended sustaining the challenge to Melzer's ballot.

Alternatively, the judge found that if the Board concluded that the unit stipulation was ambiguous with respect to the parts/mechanic position, Melzer should be included in the unit based on his community of interest with unit employees.

The Employer excepts to the judge's recommendation to sustain the challenge to Melzer's ballot. The Employer argues that Melzer's classification was unambiguously included in the stipulated unit. In the alternative, the Employer contends that the unit description in the Agreement is ambiguous and, therefore, the Board is required to look at extrinsic evidence and if necessary apply the community-of-interest test. In the Employer's view, both the extrinsic evidence and the community-of-interest factors require including Melzer in the stipulated bargaining unit. For the following reasons, we find that Melzer should be included in the unit.

In order to determine whether a challenged voter is properly included in the stipulated unit, the Board applies the three-step test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002). Under this test:

[T]he Board must determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the

<sup>4</sup> 347 NLRB No. 20 (2006)(finding "contractor technician supervisors" not included in stipulated unit that specifically included "installation technicians, including technician trainees" and specifically excluded "all other employees.")

bargaining unit by employing its normal community-of-interest test.

Id. at 1097.

To determine whether the stipulated unit is ambiguous, the first part of the *Caesar's Tahoe* analysis, the Board compares the express language of the stipulated unit with the disputed classifications. *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language, and will find "a clear intent to exclude those classifications not matching the stipulated bargaining unit description." *Bell Convalescent Hospital*, supra at 191.

The problem in this case is that the unit description in the stipulation does not match the actual classifications of the Employer. The Employer's classifications are mechanic/fueler, mechanic/floater, parts/mechanic, fuel/tire/trailer employee, and equipment washer/general helper. If the stipulation were read literally, the unit would exclude all of these employees, for no such job is included in the stipulation. A more reasonable reading would be that all of these classifications were meant to be included, i.e., that the parties used shorter job designations in the stipulation. Under this approach the parts/mechanic would be included in the unit, under the term "all mechanics". However, even this interpretation is not supported by unambiguous language in the unit description. Thus, if the phrase "all mechanics" was meant to include all mechanic positions, why does the unit description also separately list the trailer mechanic position? In these circumstances we find that the language of the stipulation is unclear as to the parties' intent concerning Melzer's unit status.<sup>5</sup>

*Halsted*, cited by the judge, is not to the contrary.<sup>6</sup> There, the unit included all "full-time and regular part-time *installation technicians*, including technician trainees," but excluded "[a]ll other employees." The disputed employees' classification was "*contractor technician supervisors*." The Board found that this classification

<sup>5</sup> Member Liebman would find that the language of the stipulation ("all mechanics") unambiguously includes Melzer, whose job title was "parts/mechanic." *Viacom Cablevision*, 268 NLRB 633 (1984). Although she would find it unnecessary to perform the remaining steps of the *Caesar's Tahoe* analysis, she concurs with her colleagues' conclusions that no extrinsic evidence as to the parties' intent resolves the issue of Melzer's unit placement and that Melzer shares a community of interest with unit employees.

<sup>6</sup> We disavow the judge's statement that our decision in *Halsted* represents a more rigorous approach to evaluating stipulations.

Chairman Battista found that the stipulated unit was ambiguous in *Halsted*. However, he agreed with the majority that the challenged employees were properly excluded from the unit under a community-of-interest analysis.

was not included in the express language of the unit description. Because there was an exclusion of "all other employees," it was clear the parties intended to exclude the disputed position. However, unlike here, there was no gross disparity between the unit description and all of the actual job classifications. We therefore find that the parties' intent as to parts/mechanic Melzer, based on the stipulation alone, is unclear.

Thus, we next examine whether we can discern the parties' intent through usual methods of contract interpretation, including looking to the extrinsic evidence. The only extrinsic evidence presented here is the Petitioner's statement in the representation petition that the unit contains 20 employees. Without Melzer's inclusion, the unit consists of only 19 employees. Thus, this evidence supports the position of the Employer, although not dispositively. Accordingly, we agree with the judge that the record does not provide any extrinsic evidence determinative of the parties' intent regarding the inclusion or exclusion of Melzer's position.

We turn next to the community-of-interest test. The judge found that if it was necessary to reach the third step under *Caesar's Tahoe*, the parts/mechanic shared a community of interest with the other employees. We agree. Based on the judge's findings and reasoning, we find that parts/mechanic Melzer is properly included in the unit.

#### DIRECTION

It is directed that the Regional Director for Region 36 shall, within 14 days of the date of this Decision, Direction and Order open and count the ballot of William B. Melzer. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

#### ORDER

It is ordered that the proceeding is remanded to the Regional Director for Region 36 for further processing consistent herewith.

Dated, Washington, D.C. January 31, 2007

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Robert J. Battista,,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Paul C. Hays, Esq., (Carney, Buckley, Hays & Marsh,) of Portland, Oregon for the Petitioner.

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## SUPPLEMENTAL REPORT AND RECOMMENDATIONS ON CHALLENGES AND OBJECTIONS

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in Medford, Oregon on March 23, 24 and 25, 2006. The matter arose as follows:

On March 8, 2006, the Teamsters Local 962, affiliated with the International Brotherhood of Teamsters (the Petitioner) filed a representation petition with Sub-Region 36 of the National Labor Relations Board, docketed as Case 36-RC-6340, seeking to represent certain employees of USF Reddaway, Inc. (the Employer).

On March 20, 2006, the Regional Director for Region 19 approved a Stipulated Election Agreement directing a secret ballot election be held in the following unit of the Employer's employees (the unit):

All mechanics, fuelers, truck washers, truck inspectors, trailer mechanics and tire persons employed by the Employer at its Central Point, Oregon facility; excluding all office clerical employees, drivers, guards and supervisors as defined in the Act and all other employees.

The agreement provided that all procedures after the ballots were counted would conform to the Board's Rules and Regulations.

The election was held consistent with the agreement on April 18, 2006, in Central Point, Oregon. The tally of ballots indicated there were 9 votes in favor of representation and 8 votes against representation with 3 challenged ballots. The challenged ballots were determinative of the election results. Thereafter both the Petitioner and the Employer filed timely objections to the conduct of the election.

The Regional Director initiated a preliminary investigation into the voting eligibility of the individuals whose ballots were challenged and the election objections of each party. The Report on Challenged Ballots, Objections and Notice of Hearing issued on May 4, 2006. The Report became final in the absence of exceptions. The Director concluded that the challenges and objections raised substantial and material factual issues, including credibility resolutions, which could best be resolved by a hearing and directed that such hearing, be held.

The Director's report ordered that:

[A] hearing will be conducted before a duly appointed Hearing Officer of the National Labor Relations Board on the issues raised by the challenged ballots and objections to election.

It further ordered that:

[T]he Hearing Officer designated to conduct the hearing shall prepare and cause to be served on the parties a Report on Challenged Ballots and Objections which will contain findings of fact, including credibility resolutions and recommendations to the Board concerning the disposition of the issues involved.

The matter was thereafter assigned to me for hearing and the hearing was held consistent with the Regional Director's Re-

port on challenged ballots, objections and Notice of Hearing on March 23, 24 and 25, 2006.

### Findings

Upon the entire record herein, including extensive and scholarly briefs from the Petitioner and the Employer, I make the following findings.<sup>1</sup>

#### I. OBJECTIONS

The Petitioner and the Employer each filed timely objections to the conduct of the election. The Director's report directed that a hearing be held and findings be made respecting those objections. The hearing held on the instant matter was structured by agreement of the parties so that the challenged ballots would be litigated first. During that litigation, the parties jointly moved to withdraw all their objections, i.e. both the objections of the Petitioner and the Employer, and to continue only with the challenge portion of the hearing.<sup>2</sup>

No evidence had been offered or received respecting the merits of the objections and there was no evidence in the record suggesting that a new election was necessary. Objections may be adjusted by the voluntary agreement of the parties. Given the joint motion and the absence of any evidence that the election was not fairly conducted, I granted the joint motion and accepted the withdrawal of each party's objections.<sup>3</sup>

Given the parties' motion and my granting of it, the objections were no longer in issue. However, in view of the Regional Director's order directing me to issue a report on both the challenges and the objections, I will make formal findings respecting the objections and will make a formal recommendation to the Board below.

#### II. THE CHALLENGED BALLOTS

The Director's report set forth the challenged ballots in controversy:

The Petitioner challenged the ballots cast by Robert A. Burk and Mathew A. Heading on the basis that they are supervisors. In addition, the Petitioner challenged the ballot cast by

<sup>1</sup> The findings herein are based on the record as a whole comprising the transcript of testimony and exhibits augmented by the stipulations of counsel at trial, the parties' post-hearing briefs, and the findings contained in the Regional Director's Report.

<sup>2</sup> Because there was no counsel for the Regional Director involved in the instant proceeding, the Regional Director was not a participant in the hearing and did not know of or have an opportunity to take a position of the joint motion.

<sup>3</sup> The joint motion to withdraw the parties' objections at the hearing was voluntarily made, the parties were each represented by skilled and experienced counsel and joined in the motion in full understanding of the consequences of the withdrawal. No subsequent motion or position has been taken by any party inconsistent with the withdrawal of the objections. I find that the granting of such a joint motion and acceptance of the joint withdrawal of all objections at the time made, and in the circumstances described, is within the authority of a hearing officer holding post-election hearings under the Board's Rules and Regulations and the Regional Director's Report. I have considered and specifically reject the proposition that only the Board and/or the Regional Director has standing to grant such a motion.

William B. Melzer on the basis that he is not in the bargaining unit.

The challenges do not concern these individuals employment during the appropriate eligibility period but rather whether or not their job duties at relevant times fell within the bargaining unit.

#### *A. Evidence Respecting the Challenges<sup>4</sup>*

##### 1. Background

The Employer is a trucking enterprise with a terminal in Central Point, a suburb of Medford, Oregon. Associated with that operation, the Employer operates a separately housed maintenance and repair facility (the Shop) which inspects, maintains, services and repairs the Employer's west coast tractors as well as trailers, dollies, and associated equipment. The Shop operates on a multi-shift 24 hour per day, 6 days per week basis with staff on call on Sundays when the facility is closed.

In essence the Shop fuels and inspects arriving equipment, does regular maintenance on a significant fleet of tractors and trailers, and repairs damaged equipment. The Shop building has exterior fueling and inspection areas and has a series of internal mechanic's trailer and tractor bays for the maintenance and repair of equipment. The Shop building also has a parts area and office for the Shop Manager as well as break and rest room facilities.

The Shop Manager for the past two years has been James Hamilton. Although reporting to higher terminal and company authority, Hamilton is the sole manager at the Shop. He is salaried and receives management fringe benefit compensation. Under Hamilton are all the Shop employees comprising approximately 20 individuals working a 3-shift, 24 hours per day/6 days a week schedule. There are no other employees. Hamilton does not have a secretary or assistant. The titles and duties of the other Shop employees are described below.

The job titles of the score or so employees and their hours and days of work are listed on the Employer's December 2005 job bid sheet for 2006 positions.<sup>5</sup> The Shop employee complement comprises: The day shifts leadman: Robert Burk, the swing shift leadman: Matt Heading, Parts/Mechanic: William Melzer, 9 mechanic/fueler employees, 1 mechanic/floater employee, 6 fuel/tire/trailer employees and an equipment washer/general helper employee. Two of the noted mechanic employees also work as part-time leads. While the Manager, day and swing shift leads, the parts/mechanic and a few others work Monday through Friday, the bulk of the employees work Tuesday through Saturday. The day shift is more heavily staffed with the swing shift having a few employees and the graveyard shift even fewer.

All of the described Shop employees under Hamilton receive wage rates set in a common matrix and receive the same non-

management fringe benefits. Wage rates are paid based on a system in which individuals are rated as class A, B or C, A being the highest classification, and within each class as a 1, 2 or 3 grade employee with 3 being the highest rating. Thus, the highest skilled employee able to do all mechanic tasks necessary is rated A3, lesser-skilled employees might be rated as A1 and new lesser skilled employees at B1, etc. All employees punch a time clock; all receive the same rate of premium pay for overtime. Lead duties are uniformly compensated by an additional payment of \$5 per day. The day and swing shift leads are scheduled for ½ hour per day more than the other Shop floor employees.

##### 2. William Melzer

William Melzer's title is Parts/Mechanic. He was selected for this position which was not subject to employee bid as were all other Shop non-lead positions. His duties focus on the ordering, receipt, storage, and provision of parts for the use of Shop employees when working on the Employer's equipment. An experienced mechanic, Melzer consults with mechanics on technical issues respecting parts and their availability, diagnoses parts problems, repairs certain parts, and obtains and delivers parts. There is no dispute that he is primarily involved in advising other mechanics regarding, acquiring, maintaining, repairing, and recording and tracking the parts used in the Shop's operations. He has a table or bench mounted computer in the parts area of the Shop – an area defined by a perimeter of bins and shelves holding inventory of necessary repair and maintenance parts. He is authorized and, on a regular basis, enters inventory and part use information into the Employer's proprietary software system that other employees other than the Shop Manager are not authorized to do. He also delivers parts to mechanics and may pick up or exchange parts or repaired equipment locally. He works the day shift Monday through Friday.

The great majority of Melzer's time is involved in the record keeping associated with the process. Thus parts must be ordered from vendors, received and recorded within the Employer's computer record system and, when used, assigned to the appropriate repair order. In conjunction with this process warranty issues, exchange procedures and a myriad of other procedural steps arise.

While there was some evidence that Melzer also does a bit of mechanic work on equipment as assigned and acts or at least has acted as a fueler, it is clear that he is essentially engaged full time in the parts aspect of the Shop operation. Hamilton testified that changes in the Employer's handling of the acquisition and parts record keeping process has become significantly more complicated in recent years and the parts/mechanic position has evolved over that transition.

##### 3. Leadmen Robert Burk and Mathew Heading

The employees called by the Petitioner generally referred to the title of the individuals under Hamilton who directed them as their foremen or supervisors. The terms were not simply a recent construct generated to support the challenges. Employee Frank Escobar referred to the position as "forman" in a written communication to management in August 2004. The Em-

<sup>4</sup> The Petitioner called six unit employees to testify respecting the challenged ballots. The Employer called Shop Manager Hamilton. None of the challenged voters testified.

<sup>5</sup> The Employer utilized a list of job titles for Shop employee bidding purposes in December 2005 in evidence as Employer's Exhibit 5, it provides the most objective pre-petition evidence of the Employer's titles of the positions at issue.

ployer's records make clear, however, that the correct title of the positions at issue are lead or leadman. As noted, leads receive the same fringe benefits as other Shop employees save for the \$5 per day lead rate, are otherwise classified according to and paid from the skills A, B, C/ 1, 2, 3 matrix earlier described and wear the same coveralls as other employees.

Hamilton testified at some length to the nature of the operations of the Shop and his role as Manager and the role of the leads and other employees in the Shop's day-to-day operations. The Shop is responsible for regular maintenance and tracks and arranges for the arrival at the Shop of, almost 300 of the Employer's truck tractors. It fuels and inspects all equipment arriving at the terminal – a significant number of trucks and trailers, some loaded some empty. It deals with unscheduled repair of equipment that has been in an accident, simply experienced a mechanical failure or failed inspection. It provides its skilled mechanics to the terminal management on request to repair other equipment that may have been damaged or failed.

The tasks described above, again as described by Hamilton, involve the tracking and scheduling of equipment needing scheduled maintenance but also has a large component of unscheduled, in essence surprise, or emergency, work as various repairs are necessary on arriving equipment. Further, particular tasks which may initially be anticipated to require a short period of time can, upon further investigation of the problems involved, become major time consuming repairs. In undertaking these tasks there are a variety of time priorities, i.e. the repair of certain equipment such as loaded trailers, takes precedence. The Employer maintains a detailed database tracking many aspects of the repair and maintenance process which must be kept up to date with entries for work done and parts used. So, too, given equipment has expenditure restrictions and/or warranty issues which requires careful monitoring.

The scheduling and coordination of this dynamic mix falls largely to Hamilton who has no secretary or titled assistant manager. He also has other regular coordination and communication responsibilities with both the terminal-based and higher Employer management. He described his work week as a time of seemingly frenetic effort to accomplish the needed tasks while meeting and coordinating with Lead Burk who assists him on Mondays – the one day of the Monday to Friday work week on the day shift that is relatively quieter and has less staffing – to plan out the work of the week ahead. Each day thereafter the two adjust the work plan as circumstances dictate. As Hamilton testified respecting this effort with Burk:

Q. How often do you meet with Burk on a typical day to talk about what you want done out in the Shop?

A. A typical day, we have a real briefing between 7:00 and 7:30 in the morning; that's when we sit down and plan. I have a plan and he does -- he helps me with it. I administer it, he carries it through, okay? During the day I will meet with Burk. It would not be unusual for me to say nine to twelve times a day.

Hamilton testified that he is regularly so busy that Burk will answer the phone and turn away vendor representatives and others who seek an unscheduled meeting with Hamilton. While busy, he testified he regularly visits the Shop floor and is in

very frequent communication with his leads concerning all matters of work and personnel.

Hamilton testified that the day and swing shift leads, Burk and Heading, are actively involved in "working the plan" he had "administered" by assigning work to Shop employees on an ongoing basis and monitoring the progress of work, job safety and other job conditions and circumstances. He testified that Leads Burk and Heading exercise substantial skill, energy and authority in fulfilling his plan. Nonetheless Hamilton in a series of paired questions from the Employer's counsel denied that any lead had the authority to, or ever had, in fact exercised any of the panoply of powers enumerated in the definition of supervisor set forth in Section 2(11) of the Act.<sup>6</sup> And Hamilton further denied that any lead had ever made a recommendation to him respecting such matters which recommendation he accepted without an independent investigation of the situation.

Hamilton testified to two areas where Burk and Heading were of direct assistance in personnel matters in 2005. First, Hamilton utilized the two leads in the hire of a new truck washer employee. After the applicants for the single job had been narrowed down to three, Hamilton assigned each lead to consider the three applications with the task of recommending one of the applicants to him for hire. As Hamilton testified, he asked the two leads to look at the applications and "give me their feedback on who they felt was the best applicants to call in." Each lead studied the three applications in Hamilton's office in an open manner that was observed by many of the Shop employees who recognized the applications under study as those submitted by job seekers.

Hamilton then met with the two leads respecting the three job applicants. In Hamilton's words "they could not agree" on a specific individual to hire. Hamilton testified:

I was still undecided. At that point, I called those three applicants back in for another interview that the lead people were involved in, and I let them ask questions. At that point, we were still not in agreement. I was not in agreement with them.

Hamilton then submitted all three applicant's names to the Employer's Human Resources department for reference checking and vetting, pursuant to the Employer's normal protocols. In a few weeks Hamilton was informed by the Employer's Human Resources department that all three applicants were acceptable and he should choose one. Hamilton again consulted with Burk and Heading. He and Heading agreed that one individual should be hired. Presumably Burk preferred another applicant. In consequence Hamilton testified, he hired the individual recommended by Heading whose recommendation he agreed with.

The employees were aware of the leads role in the hiring process. And at least some knew not just of the inspection of applications but of the effective recommendation of

<sup>6</sup> Section 2(11): The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

the leads. Thus, Justin McClenny testified that Heading told him of his and Burk's role:

Q. [H]as Heading ever made any representation to you regarding his role in the hiring process?

A. Yes, he told me that him and Bob Burk and Jim Hamilton all went through applications, reviewed them, picked the one they liked and at the end they voted. The majority of the three won.

Hamilton further testified that he changed the Shop's annual evaluation procedures<sup>7</sup> for the December 2005 cycle. He described the new procedure:

This year I wanted to give the employees an opportunity to evaluate [themselves]. I also give, according to what our company rules and regulations are, my lead men an opportunity to evaluate the employees that are on their shift. I do that. The employee is supposed to and in most cases, do, fill out the evaluation. They return it to me; some signed, some not signed. The lead people fill out the evaluation on that employee.

Q. On a separate piece of paper?

A. On a separate piece of paper. These are done totally separate. There's three copies. I take one and I fill it out. Now, I receive all three of them down here and yes, I do have the lead men initial the bottom of those pages. That way I know who did the evaluation. I take all three and I look at them and if there's a problem with those, if I don't feel the lead man has given the employee a good enough evaluation or there's a problem, I want to know why. At that point, I bring the lead man and the employee into my office and ask him why. I make the final decision. That's how the plan works.

Q. You say you make the final decision as to what?

A. What the rating of the employee is.

Q. Okay.

A. And I do let every employee know that they have a right to object to any rating that they gave and guess what, 99 percent of them underrate [themselves].

The process involved only the two leads, Burk and Heading, who were involved in all evaluations of Shop employees under their direction. Burk and Heading received annual evaluations from Hamilton but no third individual was involved in that process for them. Various Shop employees testified to being shown their evaluation by their lead. Most testified that their evaluations were signed by their respective leads. While the record makes clear that the leads signed their own evaluation of each employee under their direction, they did not sign the final copy which was signed by Hamilton.

The 2005 Employee Evaluation and Review (Mechanic) forms comprise two pages of employee data and provides space for the entry of numeric 1-9 ratings respecting various performance areas including, for example, three rating areas under "At-

titude": "Able to get along with fellow employees", "Able to get along with supervisor", and "General Attitude toward job". Under "Production" there were additional rating areas including: "Able to work up to job volume standards", "Able to work without supervision", "Arrives for work on time", and "Regularly completes shift". There are spaces provided for narrative answers to questions such as: What does employee need for advancement?; What does employee need for overall job improvement? Performance improvement since last review or date of hire?; Recommendation and action taken. There is a space for an overall rating. A signature line is provided for the employee as well as a date line. There is also a "reviewed by" line and a second line for the reviewer's "title". There are no other signature lines on the form.

The final evaluations were at least in some cases delivered to the employee by the lead and the scores discussed between the two individuals. Thus, Aaron Goettsch testified:

I had talked to Heading about it. I had asked him about some of the scores being, arrives to work on time, I only had a 5. I asked him why I only received a 5, and he told me that's what he gave me. He doesn't start until 3:00. So he doesn't know what time I get here. So he just give me an average is what he told me.

There was testimony introduced by the Petitioner respecting statements made by management and the leads concerning the supervisory authority of leads Burk and Heading.

Justin McClenny testified that Burk has said in his presence in the Shop: "I run the Shop." He also testified that Hamilton said the same respecting Burk:

Q. Has Hamilton made any representation in your presence regarding Burk's authority in the Shop since the time that Burk became lead man and before the NLRB election?

A. Yes, he said this is Bob's Shop. I'm going to let him run it.

Similarly Frank Escobar testified to a dispute with Burk respecting a job assignment Burk had made. Escobar recalled Burk told him: "And he says, I am the supervisor. This is my Shop. He goes, you do as you're told. If you have a problem, go see Jim [Hamilton]".

Aaron Goettsch corroborated McClenny regarding Burk's personal statement that he "runs" the Shop. Indeed he recalled another occasion: "[Burk] was saying that Hamilton told him that he was able to give us [disciplinary] letters. So I was going to be the first one to get a letter by him."

Goettsch also corroborated McClenny's testimony respecting Hamilton's statement regarding Burk. Thus in the latter situation he recalled Hamilton told him of Burk: "it's his Shop to run it how he wants." Escobar described a meeting with the terminal manager, Bill Allman<sup>8</sup>, Hamilton, and Heading respecting a dispute between Heading and Escobar in very late 2005. Escobar testified that Hamilton "told me that Matt [Heading] is in charge, in front of Bill Allman,

<sup>7</sup> Performance and Wage reviews under the Employer's Oregon Employee Handbook are annual. The manual notes: "Whether or not an adjustment in your rate of pay is warranted will be determined by and will be commensurate with the appraisal of your individual job performance, skills and dependability."

<sup>8</sup> The transcript has variant and phonetic spellings of Allman's last name.

and that Matt runs the Shop.” Employee David Jumbeck recalled “several times” Hamilton told him that Burk “was the day forman and [Hamilton] backs him up a hundred percent, right or wrong...”.

Substantial testimony was received respecting the two lead’s role in granting employees time off. Various employees testified that they had requested time off for various reasons from leads Burk and Heading on many occasions and had regularly had their requests immediately granted or denied on the spot. No consultation between the leads and Hamilton occurred between the request and its being granted or denied. Employees testified that on numerous occasions they had gone to Hamilton with a time off request and Hamilton had not addressed it but rather directed them back to their leads with admonitions from Hamilton that if the time off request was OK with the lead, it was acceptable to him.

Hamilton testified that leads are not authorized to grant time off at the Shop and have never done so. He also testified:

Q. Have you on occasion told employees to check with their lead men?

A. Yes, sir.

Q. And why did you do that, sir?

A. Well, if it’s in the instance of vacation, the reason for that as I indicated, you know, I plan the work, they work the plan. Okay. I will go out and have him go through the correct procedures. If the lead people are trying to work the plan, they need to know who is not going to be available. At that point, and I don’t want blindsided. I don’t want them coming to work and somebody’s not there and not knowing how to crew for the particular day. At that point they come back in and they refer to me that so and so asked for the day off, and I said, yeah. They want the particular day off. And I’ve already looked at the calendar. I know if it’s available or not, and if it is available, they’ll say I don’t have a problem with it.

Q. And why do you have them check with the lead man?

A. I don’t want the leadman blindsided.

There is no question that Burk as the day shift lead had the primary role in assisting Hamilton in completing his plan. He also clearly spends the great bulk of his time executing the “plan”. While Hamilton testified he regularly visits the Shop floor and essentially constantly meets with Burk regarding the work of the day as it evolves, he also testified that he is often trapped in his office by other duties and is unable even to answer the phone. Burk regularly observes the Shop staff at work and assigns mechanics and others specific tasks to do, changing and reassigning work assignments as needs and circumstances require. While Hamilton testified he has a role in this, the Shop employees who testified described job assignments by the leads without consulting Hamilton as regular, frequent and typical.

Heading is lead on the swing shift. The swing shift is primarily concerned with continuing the progress that has been achieved by the day shift. Thus Heading to a degree takes on the tasks not completed on the day shift and at the end of his

shift passes the information concerning the tasks that still needed to be completed to the graveyard. The swing shift staffing is smaller than the day shift and the graveyard staffing is smaller still. If Heading works with a smaller crew and is not so heavily involved in the planning stages of the process, he operates as the highest ranked employee in the Shop on that shift and does not have the on site presence of Hamilton or Burk which might allow him to consult others before taking supervisory action.

The Employer maintains an elaborate and detailed record keeping system which requires employees to enter the time they work on given equipment in six-minute intervals. Work assigned to a particular piece of equipment is known as “direct” labor. Work time not dedicated to a specific piece of equipment is “indirect” time. Each category in turn has sub-classifications to more accurately describe the nature of the work. The unit employees testified consistently that they recorded essentially all their time save breaks as “direct” time. Burk’s summary of recorded time for calendar year 2005 puts his “direct” time as fewer than 15% of his total time worked. Within the larger indirect category, Burk’s largest category of time worked was “supervision” at 38%. Heading’s summary of recorded time for the year 2005 records approximately 70% of his working time as “direct”. Of his recorded “indirect” time, which comprises about 30% of his total time, over half, 17+%, is described by him as “supervision”.

Hamilton attempted to explain these entries. He suggests that since the entries had been made by the leads and since there has been no instruction to them respecting what to record as supervisory indirect time, the entries sub-category were of little significance. He suggested the entered supervisory time could have involved phone conversations, motor oil quality analysis or other tasks not related to the supervision of Shop employees. Melzer’s 2005 report records less than one third of one percent of time spent in supervision. There was no evidence that the annual summaries described above had ever been commented on by reviewers prior to the representation proceeding.

## *B. Analysis and Conclusions*

### *1. Credibility*

Counsel for the Petitioner argued in support of the testimony of unit employees who testified and counsel for the Employer urged that the testimony of the Shop Manager be found pre-eminent. The instant record is unusual in that while the Shop Manager and many unit employees testified, neither the two leads – Burk and Heading – nor Melzer, the parts/mechanic, testified. Thus, views and opinions regarding the circumstances of the challenged voters at relevant times were adduced by the opposing sides in a largely tangential manner. The great bulk of the testimony was not challenged by opposing testimony. Little regarding Melzer’s work history and circumstances was in dispute.

Respecting the supervisory status of leads Burk and Heading, as set forth in part above, numerous unit employees attributed statements and actions to Burk, Heading and Medford Terminal Manager Allman that were not addressed by Burk, Heading or Allman—they did not testify. Similarly the testimony of Shop

Manager Hamilton respecting what he said and did with the two leads stands alone since no one else involved—Messrs. Burk and Heading—testified.

The absence of the testimony of Burk and Heading, allowed two seemingly inconsistent scenarios to exist unchallenged in the record by direct testimony. Thus, for example, Hamilton testified that neither Burk nor Heading were ever told that the Shop was theirs to run and further testified that the two never made such statements either alone with him or in the presence of others. Numerous employees, as set forth in part above, testified to a series of such statements made by both leads to the employees that the leads were in charge of the Shop and that their orders must be obeyed by unit employees. The versions of events come into direct conflict – even without the testimony of Burk and Heading – respecting the contention of various unit employees that such statements were made by Hamilton in their presence or were made by Burk and Heading in Hamilton's and the employees' presence. Hamilton's categorical denial that this ever occurred presents the clearest testimonial conflict in the record.

The general picture of the supervisory role and relationship of Hamilton, Burk and Heading, is painted completely different by Hamilton and the unit employees. Thus Hamilton described a Shop in which he, despite being remarkably busy with a great multitude of tasks, was able to handle all supervisory tasks and instruct and advise his leads Burk and Heading respecting essentially every aspect of their contacts with unit employees. The employees described, from their perspective in a corroborative way, a busy Shop Manager whose lead employees had taken on supervisory tasks that the Manager was too busy to handle and, who had explicitly made it clear to employees that the leads were in charge and that this happened on some occasions in the presence of Hamilton with his acquiescence and in some cases agreement.

The Petitioner's evidentiary case on the leads is comprised of the testimony of the various unit member witnesses. I observed with care each unit employees demeanor while testifying. The unit employees who testified were Shop unit members and not professional witnesses. They testified with the hesitancy and confusions of laymen testifying to events and experiences for the first time in a courtroom and in what clearly seemed to them to be an artificial and stilted form and manner. Such demeanor in a witness is a sign of honesty and guilelessness. Individually and collectively, the witnesses simply did not appear to me to be prevaricators or on a mission to stretch the truth concerning their experiences and observations at the Shop. They seemed, rather, to be attempting as best they could to understand the questions presented and to understand and conform to the artificial way the judge and the counsel wanted the facts recited. And finally and most importantly, I was convinced as to each of them that they were attempting to truthfully answer the questions put to them.

Counsel for the Respondent in skilled cross-examination tested their recollections and revealed difficulties and animosities held by some of the unit employee witnesses against the Employer or its agents. Counsel for the Respondent established that essentially all the unit employee witnesses were wrong in believing that their annual evaluations were signed by their

leads rather than Hamilton. Respondent argues these and other inconsistencies require discrediting the unit employees' testimony where it differs from the testimony of Hamilton. The Respondent's arguments against the credibility of the unit employees' testimony while lawyerly are simply not persuasive given my contrary favorable impression of the witnesses. The opposing arguments on this record are not of the significance needed to undermine my strong belief after observing the unit employees' testimony that they were truthfully telling what they recalled and that what they recalled was not significantly distorted by the lens of hostility, bias or inattention. One factor that gave me confidence in the veracity of the unit employees' testimony was their lack of reluctance on numerous occasions to freely admit they had not observed particular conduct the Petitioner's counselor was searching for in his questioning. Thus, had the witness ever heard a given lead assert authority over the witness, counsel might have asked. "No, he didn't", was the unhesitating answer of various unit employees on numerous occasions. Honesty and forthrightness in giving evidence which is not supportive of one's side is evidence of a broader truthfulness in a witnesses' testimony.

I further note that the various specific incidents testified to by the unit employees together form a mutually corroborative pattern of conduct by Hamilton, Burk and Heading. The unit employee witnesses, whose testimony is set forth in part above, were sequestered during the hearing yet provided numerous examples of similar conduct by Hamilton and the leads observed at different times and in different circumstances.

If the testimony of the unit employees was comprised of numerous independent events and circumstances which were mutually reinforcing and corroborative, the testimony of Hamilton—the sole witness for the Employer—in its critical elements may be characterized as a broad-brushed denial of actions and events. Thus, as set forth in part above, Hamilton testified to a litany of things that never occurred and in some cases followed up that testimony with equally broad statements that some things always occurred. Thus, for example, he testified categorically that he did not authorize Burk and Heading to take actions falling within the definition of supervisor set forth in the Act. He testified he did not ever observe the leads ever taking such action. Hamilton testified that he personally, always exercised supervisory powers himself and never heard recommendations from his leads concerning such matters without independently acting on his own, and then, only after an independent investigation of the relevant circumstances.

Hamilton had a sound demeanor. I perceived no posture or appearance suggesting intent to deceive. I did however find his testimony favored the broad or sweeping generalization over detail and nuance. There were two further aspects of his testimony that undermined its plausibility in my view. First, Hamilton painted a picture of a man doing the tasks of several busy managers, so busy that his day shift lead had to answer the phone and shelter him from inquiries and other matters, yet he could testify that without exception he undertook every supervisory responsibility in the entire Shop of 20 employees working 24 hours a day and 6 days a week. I found this testimony implausible and far less likely than the picture painted by the mutually corroborative testimony of the unit employees that the



leads were, at the very least, taking it upon themselves to supervise the Shop operations in a significant way.

Further, and importantly, Hamilton's broad generalizations of personal retention of all supervisory authority and the complete absence of such authority or action on the part of Burk and Heading were impeached by his own testimony of specific actions and procedures he instituted. Hamilton testified that he did not solicit or accept the recommendations of his leads on the hire of employees and that they had never made such recommendations. Yet his own testimony reveals that he had the leads study job applicants' applications and make recommendations to him respecting the hire of the best applicant. Only after he had the two leads interviewed the applicants anew with him did Heading recommend the same applicant that Hamilton favored. Hamilton hired the applicant chosen by the two of them. As Heading told an employee, in the uncontested testimony of the employee as set forth above, the hire went by majority vote.

Again, Hamilton broadly denied any lead's role in the evaluation and reward of employees. Yet again Hamilton testified to having Burk and Heading evaluate all the employees under them on the same annual evaluation forms that Hamilton signed and that were the basis for employee promotion and reward for the year. Hamilton testified he used the leads' employee evaluation forms to better inform his own final judgment on each employee. The evaluations, as discussed in detail above, involved important subjective judgments on the attitudes, work skills and progress made by employees. The leads helped Hamilton judge other employees, the process was not used on the leads evaluations. The leads role in this process is unequivocally supervisory.

All of the above as well as my observation of the witnesses and the record as a whole, instilled in me a greater confidence in the testimony of the unit employees over Hamilton regarding the larger picture of events. I apply the same analysis and reach the same conclusion where the unit employees testified, as set forth above, that statements of Burk's and Heading's authority over Shop employees were made both by Hamilton and by Burk and Heading in Hamilton's presence and Hamilton denied that such statements had ever been made by him or by anyone in his presence. I credit the corroborative statements of the employees set forth above over the denials of Hamilton. I find the statements described by the unit employees occurred as they credibly testified.

Supporting this determination is the fact that the Unit employees testified to conversations with and statements made by Burk and Heading alone with the employees outside Hamilton's presence which were not denied by the leads since the two individuals did not testify at the hearing. I note as well that Terminal Manager Allman also did not appear to address the testimony that such statements were made in his presence.

## 2. The Challenged Ballot of Melzer

The Petitioner's challenge to the ballot of Melzer is premised on the argument that he is not a member of the stipulated bargaining unit. The Board has very recently restated from *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002), the correct analytical approach to challenges respecting unit placement in stipu-

lated bargaining units in *Halsted Communications*, 347 NLRB No. 20, slip op. at 1 (2006):

When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board's function is to ascertain and enforce the parties' intent, provided that it is not contrary to any statutory provision or established Board policy. *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). To determine whether an individual is included in the stipulated bargaining unit, the Board applies a three-step test. First, the Board must determine whether the stipulation is ambiguous. If the stipulation clearly expresses the objective intent of the parties in unambiguous terms, the Board simply enforces the agreement. If the stipulation is ambiguous, the Board continues to step two and seeks to determine the parties' intent through usual methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still remains unclear, the Board will reach step three and employ its standard community-of-interest test to determine the bargaining unit. *Id.*

To determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classification. *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. *Bell Convalescent Hospital*, supra at 191. If the classification is not included, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification. *Id.*; see also *National Public Radio, Inc.*, 328 NLRB 75 (1999); *Prudential Insurance Co.*, 246 NLRB 547 (1979). The Board bases this approach on the expectation that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. *Bell Convalescent Hospital*, supra at 191.

Following the Board's instruction, the objective respecting Melzer's challenged ballot is to ascertain and enforce the parties' intent by applying the described 3 step *Halsted* test. First, does the stipulation clearly express the objective intent of the parties in unambiguous terms? The stipulated unit is as follows:

All mechanics, fuelers, truck washers, truck inspectors, trailer mechanics and tire persons employed by the Employer at its Central Point, Oregon facility; excluding all office clerical employees, drivers, guards and supervisors as defined in the Act and all other employees.

The job title of Melzer is "parts/mechanic".

Melzer's job title does not fall entirely within any of the unit's specifically included categories. The stipulated term included in the unit is: "mechanic" which is but a part of the two word title of Melzer: "parts/mechanic". There is no broad "work type" inclusion category in the stipulated unit description such as "all truck repair and maintenance employees". The

stipulated unit does contain a broad exclusion from the unit of “all other employees”.

I find that the job title: “parts/mechanic” is not clearly and unambiguously included within the list of included categories in the stipulated bargaining unit. That question is answered by the simple matching of Melzer’s title to the unit categories. There is no precise correspondence: mechanic is different from parts/mechanic.

The critical question remaining for determination is whether or not Melzer’s job title “parts/mechanic” falls unambiguously outside the unit inclusion language and therefore falls into the stipulated units general category of “all other employees” specifically excluded from the unit. Thus having found Melzer is not clearly in the unit by virtue of his job title, is he clearly out of the unit by that same job title? The parties disagree on the issue and argued their positions with skill.

The Petitioner on brief at 34 argues:

The record shows that Melzer does not fall within any of the categories of employees expressly described in the stipulated unit. Under the familiar maxim, *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another, the mention of the categories within the stipulated unit description implies the exclusion of categories not so mentioned.

The Board in *Halsted Communications*, supra at 1-2, reversed a hearing officer who found “contractor technician supervisors” to be dual function employees not clearly excluded from a stipulated unit which specifically included: “installation technicians, including technician trainees” and specifically excluded “all other employees” noting:

The disputed employees are contractor technician supervisors. This classification is not included in the express language of the unit description, and there is an exclusion for “all other employees.” Thus, the parties’ intent to exclude the disputed employees is clear. Further, the parties’ stipulation is not contrary to any statutory provision or established Board policy. We will therefore enforce the clear terms of the stipulation.<sup>3</sup> The hearing officer should not have reached the dual-function issue. A dual-function analysis is a variant of the community-of-interest test,<sup>4</sup> and it is not applied where the parties’ intent to exclude the classification is clear. *Peirce-Phelps, Inc.*, 341 NLRB 585, 585–586 (2004) (hearing officer erred by addressing the merits of the dual-function issue where the stipulation clearly excluded disputed employee); *Bell Convalescent Hospital*, [337 NLRB 191 (2001)] (same).<sup>5</sup>

<sup>3</sup> Member Schaumber notes that in *Columbia College*, 346 NLRB No. 69 (2006), referenced in the concurrence, he dissented as to the finding that the term “faculty” in the stipulated election agreement in that case was ambiguous. In his view, that finding was inconsistent with the principles stated in the precedent applied herein. See id., slip op at 3 fn. 9.

<sup>4</sup> *Berea Publishing Co.*, 140 NLRB 516, 519 (1963).

<sup>5</sup> In *Harold J. Becker Co.*, 343 NLRB No. 11, slip op. at 1 (2004), cited by the hearing officer, the Board applied a dual-function analysis to determine whether the challenged employees

were eligible to vote. Although the employees at issue in that case fell within expressly excluded classifications, the stipulated bargaining unit included “[a]ll employees of the Employer engaged in sheet metal work,” and the disputed employees performed some amount of sheet metal work. Id. at 1 fn. 3. Therefore, it was necessary for the Board to apply the dual-function test to determine whether the employees in question performed sufficient unit work to warrant inclusion in the unit. *Harold J. Becker Co.* is distinguishable from the instant situation because the stipulated bargaining unit here is defined only by job classifications and not by the type of work performed.

In *Peirce-Phelps, Inc.*, 341 NLRB 585, 585–586 (2004) the Board expressly stated:

Where a stipulation includes certain job classifications and expressly excludes “all other employees,” “[t]he Board . . . will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description.” *Bell Convalescent Hospital*, [337 NLRB 191 (2001) at 191].

The Employer emphasizes that Melzer is a mechanic and his title reflects that fact. The Employer argues that it is wrong to focus on the parts portion of Melzer’s job title (Employer’s Brief at 25):

This narrow view of who is a mechanic, while helpful to the Union’s position, ignores the reality of the Shop’s operations and who the Employer classifies as mechanics.<sup>4</sup>

<sup>4</sup> Even more significantly, as demonstrated earlier, if in fact Melzer was titled a mechanic by the Company prior to the execution of the Stipulated Agreement of Election, which he undisputedly was, the existence of such title conclusively determines his membership in the potential bargaining unit.

I have considered the arguments of the parties in light of the record as a whole. I have devoted particular attention to the Board’s teachings in the area with great attention to the recent cases including those cited above which admonish and reverse hearing officers who fail to find that the language of stipulated agreements unambiguously exclude certain classifications and erroneously turn to “dual function” tests to ascertain if the given employees or job functions fall in the unit. While it is my instinct to find that the classification “parts/mechanic” is not clearly excluded from the stipulated bargaining unit and then turn to the secondary tests provided under *Halsted Communications*, supra, I read the recent Board cases as applying a more rigorous approach to the unit exclusion issue.

Rather, I conclude the Board would find the fact that the “parts/mechanic” job classification does not fall unambiguously within the stipulated bargaining units inclusions: all mechanics, fuelers, truck washers, truck inspectors, trailer mechanics and tire persons, that it therefore falls under the exclusion language “all other employees”. This being so, the Board would hold the parties to their stipulation and find the position “parts/mechanic” and Meltzer, to be without the bargaining unit. I reach this conclusion despite the burden the challenging party bears to establish the disqualification of the challenged voter.

Given the above, I find and conclude that the position of “parts/mechanic” is not included in the parties stipulated bar-

gaining unit and, in consequence, Melzer was not in the unit at relevant times. It further follows the challenge should be sustained and Melzer's ballot should not be opened and counted.

### 3. An Alternate Analysis Should Reviewing Authority Differ Regarding My Findings as to Melzer Set Forth in No. 2 Immediately Above

Having found the parties stipulated bargaining unit excluded the "parts/mechanic" Immediately above, the challenge to Melzer's ballot has been resolved. Were reviewing authority to differ with that finding and rather find that the placement of the "parts/mechanic" position within the stipulated unit was ambiguous, further analysis under the *Halstead* analytic framework discussed above would be necessary.

In order to avoid a remand in such a circumstances, I herein below make alternate findings assuming for purpose of this conditional analysis that the unit stipulation is ambiguous respecting the inclusion of the parts/mechanic position and Melzer.

The second quoted *Halsted* test provides: "If the stipulation is ambiguous, the Board continues to step two and seeks to determine the parties' intent through usual methods of contract interpretation, including the examination of extrinsic evidence." The instant record does not provide any extrinsic evidence determinative of the parties intent to include or exclude the parts/mechanic position in or from the unit.<sup>9</sup> The record simply contains no extrinsic evidence of the parties intent respecting Melzer or his job position at all. I find therefore that applying the Board's second test, the parties' intent still remains unclear.

It follows therefore to turn to the third and final quoted *Halsted* test: The application of the Board's normal community-of-interest test to determine the inclusion or exclusion of the disputed category from the bargaining unit under unit determining community-of-interest principles. The factors for consideration include distinctions and similarities in the skills and functions of particular employee groups, their supervision, the employer's organizational structure, differences and similarities in employees wages and hours, as well as the extent of integration of operations, interchange and contacts.

Here the application of the Board's representation unit case law produces a clear and definitive result. Melzer as the parts/mechanic employee has a mechanic background, exercises some mechanical skills and consults with other mechanics regarding mechanical problems involving parts. As noted supra, the employees receive identical non-wage compensation, bid on vacation in common, and wear the same uniform. The

entire unit is engaged in the work of fueling, inspecting, maintaining and repairing the Employer's rolling stock. The parts/mechanic position is a full participant in that process.

Further the skills of the parts/mechanic on this record are one with the overall community of interest of the unit centered on fuelling, washing, inspecting, maintaining and repairing the Employer's on the road equipment. Other factors herein such as the common prior experience, identical non-wage remuneration and the regular day to day contact of all the employees argues for a common community of interest. Where such a community of interest is established, a mechanic unit will include parts employees. See e.g. *Indianapolis Mack Sales and Service*, 288 NLRB 1123 (1988). See also, *Caesar's Tahoe*, 337 NLRB 1096 (2002); *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994).

Absent inclusion of the parts/mechanic in the unit, the position would stand in isolation as the only non-supervisory employee in the Shop not in the unit. The Board is always reluctant to isolate a single employee from a larger unit essentially denying that single employee the right to collective-bargaining representation.

Given all the above, I find the position of parts/mechanic as has been performed by Melzer at relevant times, would without doubt have been included in the unit in controversy herein had Board standards been applied to the facts present on the instant record. That being so, the Board's third *Halsted* test has been met: the position is properly in the stipulated unit. It follows that Melzer as the parts/mechanic employee was in the unit at the relevant time. He was therefore eligible to vote and the ballot he cast should be counted with other voting unit members. The challenge to his ballot under this alternative analysis should therefore be denied and I would recommend that course to the Board.

### 4. The Challenged Ballots of Burk and Heading

The Petitioner challenged the ballots of Burk and Heading contending each was at relevant times a supervisor. Statutory supervisors are specifically excluded from the stipulated bargaining unit and are not eligible to vote in Board representation elections. If either individual was a statutory supervisor at relevant times, he was not eligible to vote, the challenge to his ballot would be sustained and his challenged ballot should not be counted. The Employer contends neither employee was nor is a supervisor.

The party challenging a voter asserting the voter is a supervisor bears the burden of establishing that status. *Kentucky River Community Care*, 532 U.S. 706 (2001). Possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. E.g., *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Issues of supervisory status are fact intensive and careful examination of the relevant facts and circumstances in each case is necessary. Since it is the Petitioner who challenged each individual as a supervisor, I apply the burden of proof on the issue to the Petitioner here. With that fact in mind, I shall consider the challenges in light of

<sup>9</sup> The Petitioner notes that the Union's representation petition recites that the unit contains 20 employees and, counting Melzer and the two leads in contest, there were 20 individuals in the unit. The Employer argues these facts show the Petitioner had an intent to include the leads and Melzer in the unit. I find first that the Union's knowledge of the actual numbers of employees and their job titles and positions at the time it filed the petition has not been demonstrated and was likely inexact. Second, it is not clear that the intentions of the Petitioner at the time the petition was filed were the same as when the stipulated unit was agreed upon.

the record as a whole and the credibility resolutions noted, *supra*.

The initial argument of the Petitioner is that the leads Burk and Heading use their independent judgment in responsibly directing the work of the Shop employees. As noted *supra* the record is clear given my credibility findings, and I find that each lead regularly assigns and reassigns Shop staff to various tasks as the constantly changing work load of the Shop requires changes in the order the work of the Shop is addressed. I further find that, having resolved the credibility element in this area adversely to Hamilton, a great number of these decisions are taken by the leads without consultation with or approval by the Shop Manager. In making the changes in job assignments, the leads use their knowledge of the technical requirements of the various jobs, their knowledge and understanding of the skills and speed of the individual Shop employees to best meet the Employer's production priorities. As Hamilton testified, he may "administer" the plan for Shop operations, but the leads "work" the plan and importantly I find that part of that process involves the leads independently making regular work assignments and reassignments to keep the plan on track under changing circumstances.

In *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972), the Board considered an individual who scheduled and assigned work to shop employees, gave them their orders and instructions, helped them in performing their jobs and made certain that the work was done properly. These duties were found to rise to the level of responsible direction.

The leads role in the hiring of new Shop employees, as took place in the hire of a new truck washer as described above, was also advanced by the Petitioner as an indicia of the two leads' supervisory responsibilities. The Board recently considered the challenge of an individual as a supervisor who had a role in considering applicants for hire. *J. C. Penny Corp.*, 347 NLRB No. 11, slip op. at 3 (2006). The Board noted:

The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. See [*Bowne of Houston*, 280 NLRB 1222 (1986)] at 1225 (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority); *The Door*, 297 NLRB 601, 601-602 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews).

It is clear from the Board's analysis that the leads participation in the hiring process does not support a claim of supervisory status unless the recommendations of the leads regarding hiring were effective. It is clear and I find that while Shop Manager Hamilton had the final say in selecting one of the three final applicants for hire, he had asked for the leads recommendation on who he should hire and they had made such recommendations. When in the initial meeting with the leads,

neither lead agreed with Hamilton's choice of applicants, Hamilton declined to hire any applicant. After subsequent interviews of the three applicants in which the leads participated along with Hamilton, Hamilton solicited the leads' recommendations on which applicant to hire once again. When one lead, Heading, agreed with Hamilton on a particular applicant to hire, Hamilton then hired the recommended applicant. As Heading explained the process to a Shop employee later, the hire was decided by a "majority vote" taken among Hamilton, Burk and Heading.

Because of the disparity of initial recommendations of the two leads, i.e. they did not agree with one another or with Hamilton respecting which applicant to be hired, Hamilton put off selecting any applicant for hire. Because of the subsequent agreement of Heading with Hamilton's choice of applicant to hire, i.e. two of the three were now of a common mind on who to hire, Hamilton hired the recommended applicant. Thus, the initially disparate recommendations of the leads in my view blocked hire of any applicant after the first "vote" and later the agreement of the recommendations of Heading with Hamilton caused the hire of the applicant who received the two of three "votes" for hire. This series of circumstances convinces me that recommendations of the leads were clearly effective, as the word is used in Section 2(11) of the Act. No independent investigation of the Shop Manager was involved in relying on a lead hire recommendation. Thus, I find that the Shop Manager specifically authorized the two leads Burk and Heading to participate in the hiring process, solicited their recommendations respecting the hire of one of the three final applicants and was guided by their recommendations in a manner demonstrating that the two leads recommendations were effective.

The two leads participation in the 2005 employee annual evaluation process is also advanced as evidence of their supervisory status by the Petitioner. Clearly each lead evaluated and rated employees whose work he directed and, by entering such ratings on the evaluation forms being considered by Hamilton predicate to making the final copy of the form, was making a recommendation that such lead prepared ratings be adopted by the Shop Manager on the final copy. Employee remuneration was at issue in the evaluation process. Thus the process of evaluation of great importance to employees. The issue again is whether or not the leads recommendations in these regards were "effective". I find that they were. Thus, I have credited the testimony of Aaron Goetsch who described the explanation he received from his lead concerning a portion of his 2005 annual evaluation:

I had talked to Heading about it. I had asked him about some of the scores being, arrives to work on time, I only had a 5 [out of 9]. I asked him why I only received a 5, and he told me that's what he gave me. He doesn't start until 3:00. So he doesn't know what time I get here. So he just give me an average is what he told me.

Hamilton did not testify respecting Goetsch's evaluation and, as noted, Heading did not testify at all.

That credited exchange establishes in my view that the evaluations by the leads were effective recommendations in that they heavily influenced or even substituted for the Shop

Managers opinions on the final evaluation form. The “5” rating was not necessarily one which would have been awarded by Hamilton if he had independently investigated Goettsch’s time of attendance. Goettsch’s marks were generally better in other areas of the evaluation. And, of course, since Heading’s hours were different from Hamilton’s, independent investigation of the staff on that “other” shift would have been difficult for Hamilton to do on any regular basis.

The Petitioner advances the substantial testimony that the two leads were held out to unit employees by the Terminal manager, the Shop Manager and by the statements of the leads themselves, through statements of the leads or statements made by or in the presence of management, as supervisory. The employees heard the leads were “in charge”, “ran the Shop”, and the leads made various statements to employees that a failure to abide by their instructions would result in discipline or that as leads they had the power to discipline.

Based on the credited testimony set forth above, I find that both the Terminal Manager and the Shop Manager as well as the leads Burk and Heading, in the presence of employees in many settings and circumstances as set forth in part above, made it clear to employees that the leads were in charge of the Shop and that unit employees should regard them as their supervisors.

I further find that the employees did in fact regard the leads as possessing supervisory powers. This was not only true based on the evidence recited immediately above, but also because the employees, as per the credited testimony noted, had often gone to their leads with requests for time off and had those requests immediately ruled on by the lead involved without any lead consultation with the Shop Manager. And the employees credibly testified that they had gone to the Shop manager with requests for time off and been referred by him back to the respective leads for a ruling of the employee request. Hamilton’s denials of such lead supervisory activities and his own action in these regards have been discredited, *supra*.

I finally find that the leads also regarded themselves as the supervisors of the unit employees under them. This is evident from the statements the leads made as noted and the statements of Hamilton as noted. Further, these two leads recorded on Employer official documents that a substantial part of their time was spent in supervision. Further, I find that each lead, as set forth in greater detail above, threatened to discipline unit employees under his direction if the employees did not follow his direction.

All of the above, in its totality, makes it crystal clear that Burk and Heading at all times material were statutory supervisors within the meaning of Section 2(11) of the Act. I so find. It follows that they were supervisory at the time of the balloting and not properly eligible to cast ballots. Thus, I further find that the challenge to their ballots should be sustained and their ballots not be opened, counted or otherwise considered. I shall so recommend to the Board.

##### 5. Summary, Conclusions and Recommendations

The Regional Director in his Report on Objections directed that I make recommendations to the Board as to the disposition of the Petitioner’s and the Employer’s objections and the three

challenged ballots of the Petitioner respecting Messrs. Melzer, Burk and Heading.

I have granted the joint motion of the Petitioner and the Employer to withdraw their respective objections in their entirety. No objections remain pending for consideration and resolution by the Board, therefore no recommendations in that regard shall be made to the Board.

Based on the record as a whole, I have found and conclude that the Petitioner’s challenges to the ballots of Messrs. Burk, Heading, and Melzer are, and each of them is, meritorious and should be sustained. I therefore make the following recommendations to the Board.

##### RECOMMENDATIONS TO THE BOARD<sup>10</sup>

I recommend the Board sustain the Petitioner’s challenges to the ballots of Messrs. Burk, Heading and Melzer.

I recommend the Board direct the Regional Director for Region 19 to prepare and serve on the parties a revised tally of ballots reflecting the amended result that the challenges are no longer determinative of the results of the election and issue the appropriate certification of the Union as the exclusive representative of the employees in the bargaining unit.

Dated: Washington, DC June 26, 2006

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<sup>10</sup> The Board’s Rules and Regulations Section 102.69(e) provides in part concerning a hearing officer’s report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of election objections and challenges:

[A]ny party may within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, file with the Board in Washington, D.C., exceptions to such report, with supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.